No. 89-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.
CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA M. CALHOUN and EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NMTBA-THE ASSOCIATION FOR MANUFACTURING TECHNOLOGY, THE RISK AND INSURANCE MANAGEMENT SOCIETY, AND THE PRODUCT LIABILITY ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether post-trial judicial review available in connection with punitive damages awards overcomes the fundamental inadequacies in the standards and procedures for imposing punitive damages in the first instance.

2. Whether due process requires that punitive damages awards rest, at least, upon clear and convincing evidence.

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INTEREST OF THE *AMICI CURIAE*

Amici, The National Association of Wholesaler-Distributors, NMTBA-The Association For Manufacturing Technology, The Risk and Insurance Management Society, and The Product Liability Alliance, with the consent of the parties, present this brief in support of the petitioner.[1]

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[1] Letters of consent have been filed with the Clerk of the Court.

The National Association of Wholesaler-Distributors is a federation of approximately 117 national wholesale trade associations, 57 state and regional trade associations, and 2000 individual wholesale distribution firms. It represents approximately 40,000 companies with 150,000 places of business across the United States. Its purpose is to advocate its members' interests on national public policy issues affecting the entire wholesale distribution industry. The enormous legal costs, loss in productive time, and stigma attendant upon awards of punitive damages, under the system of private punishment exemplified by this case, threaten the well-being of each participant in the wholesale distribution industry.

NMTBA-The Association For Manufacturing Technology consists of over 300 firms that produce and sell equipment, products or software used in manufacturing machinery in the United States. Its members produce the vast majority of this country's metal cutting and metal forming machines. NMTBA provides representation for its members in state and national government affairs, actively promotes exports, maintains the world's largest data base on metalworking industry statistics, and spearheads formulation of safety and technical standards. NMTBA has an interest in this case because, among other things, the threat of unrestrained punitive damages awards, and the legal costs that must be incurred in obtaining reversal or remittitur, severely disadvantage the manufacturing machinery industry in attempts to compete with foreign business.

The Risk and Insurance Management Society, the world's largest association of risk management professionals, consists of approximately 4,400 industrial and service corporations, governmental bodies and nonprofit organizations. Risk management professionals analyze risks that companies might encounter and offer advice about the most effective methods of avoiding such risks and insuring against related losses. The Risk and Insurance Management Society is interested in this case because imprecise and standardless punitive damages systems make it impossible for risk management professionals to calculate with any certainty when and in what amounts punitive damages may be imposed.

The Product Liability Alliance consists of more than 300 manufacturing businesses, wholesaler-distributors, and trade associations from a wide range of industries. The Alliance was formed in 1981 primarily for the purpose of seeking uniform and rational federal product liability laws. This case is of interest to the Alliance because the current unbounded punitive damages system is a burden on its members' ability to produce and distribute products throughout the United States.

Given their diverse perspectives, *amiei* are well positioned to dramatize for the Court the difficulties facing all businesses operating under the current, essentially standardless, punitive damages system—difficulties that are aggravated by an equally standardless system for judicial review of punitive awards.

STATEMENT

This case presents a scheme of state-inflicted punishment under which the decision whether to seek punishment, and how best to pursue that objective, is left to private parties, rather than government officials. There is no disputing that punitive damages, in the form of private civil remedies, have been with us for some time, and we do not question the basic premises of such a system. But there is also no disputing that entrusting the power to seek potentially ruinous punishment to private citizens raises the potential for abuse. For example, one historian has noted that:

> The overwhelming majority of prosecutions [in England's Star Chamber] were brought by private parties, often to shore up a purely civil suit . . . . All prosecutions were ostensibly on the King's behalf,

> and therefore for the safety of the state and good order in the commonwealth . . . . However, few prosecutions were motivated by any public concern but stemmed rather from personal considerations, mainly profit or revenge. The court was in a poor position to influence let alone control its private litigants. [Thus, the Star Chamber] was too useful a tool of the vexatious litigant and the near-vexatious litigant to want for business . . . .[2]

Where the penalty exacted flows *not* into the coffers of the state, but directly into the pocket of the private prosecutor, the potential for abuse is especially great: The private prosecutor, who will reap the financial rewards of his advocacy, is thereby given strong incentive to inflame the passions of the jury to inflict ever more severe degrees of punishment.

Such potential for abuse does not argue against the system of private punitive damages in general. But it does argue strongly for the need to deploy fully those mechanisms that we have historically recognized as proper for curbing abuse and arbitrariness in connection with the imposition of punishment: strict procedural protections and clear legal standards. That need is not satisfied by the type of punitive damages scheme at issue in this case, under which

- the decision whether to impose punishment at all in a given case (as in this case) is left largely to the decisionmaker's discretion, based on broadly framed questions about whether punishment is deserved;
- juries determine the *severity* of punishment as a matter of discretion, essentially unchecked and unguided by any legal formula, standard, or ceiling established by law;
- punishment may be imposed under a burden of proof that permits the jury to inflict punishment

[2] Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chambers*, 6 Temp. L. Rev. 221, 226 (1962) (footnote omitted).

> even though it may have substantial doubts about whether the defendant did anything wrong or culpable;[3]
>
> - the standards used by the courts to review the jury's decision are no less vague than the standards for inflicting punishment in the first instance;
> - citizens may be punished repeatedly for essentially the same conduct or decision.[4]

Amici think it plain that such a system does not afford the kind of process that is constitutionally due a defendant potentially subject to ruinous punishment. Whether considered in terms of its individual constituent parts or in its totality, the system of punishment at issue in this case is so lawless that it is fundamentally inconsistent with the basic premises of our legal tradition.

Beyond this short statement, however, this brief will not attempt to present an overview of the defects in the present system of punitive damages, or address issues expectably developed in the briefs of the parties or other *amici*. In keeping with this Court's rules on *amicus* practice, this brief will instead focus on two issues, raised by petitioner, that we believe will not be the central focus of any other brief submitted in this case. *First*, we discuss whether post-verdict procedures, including the availability of remittitur, can salvage an otherwise constitu-

[3] *Cf. Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law").

[4] *Cf. Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873) ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence"); *United States v. Halper*, 109 S. Ct. 1892 (1989) (double jeopardy protections are triggered by civil fines of punitive character).

tionally infirm system of punishment.[5] *Second*, we discuss one of the significant defects in the system described above—namely, an impermissibly lenient standard of proof—and explain why application of the prevailing "preponderance of the evidence" standard does not suffice to assure defendants due process of law.[6]

SUMMARY OF ARGUMENT

I. The availability of conventional post-verdict mechanisms for reviewing punitive awards cannot obviate constitutional deficiencies in the methods for imposing such awards in the first instance. *Post hoc* remedies are not an adequate substitute for timely procedural safeguards. This is particularly true in the context of punitive damages, because existing review mechanisms are neither designed nor sufficient to remedy the sheer arbitrariness that governs jury assessment of punitive awards.

II. The Due Process Clause of the Fourteenth Amendment requires that punitive damages awards be supported at least by clear and convincing evidence. Any lesser standard—such as the "reasonably satisfied from the evidence" standard imposed in this case, or the more common "preponderance of the evidence" standard traditionally applied in civil cases—unduly exacerbates the risk of erroneously imposing punishment and underestimates the consequences of a punitive award.

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[5] *See* Petitioner Pacific Mutual Life Insurance Company's Petition For Writ of Certiorari, February 7, 1990, at 26-29 (discussing remittitur and appellate review).

[6] *See id.* at 10-11 (preserving constitutional challenges), at 21 (arguing for elevated burden of proof).

ARGUMENT

I. THE CONSTITUTIONAL INADEQUACIES IN EXISTING PUNITIVE DAMAGES SCHEMES ARE NOT SAVED BY POST-TRIAL REVIEW OF JURY VERDICTS

In the present case, the Alabama Supreme Court relied on, among other things, the availability of remittitur and other forms of post-verdict review in rejecting petitioner's constitutional objections to Alabama's punitive damages scheme. *See Pacific Mutual Life Ins. Co. v. Haslip et al.*, No. 87-482, slip op. at 13 (Sept. 15, 1989) (Appendix B to the petition for certiorari). That court's conclusion echoes the frequently expressed view of proponents of the current punitive damages system that "[j]udicial controls provide sufficient procedural protection against excessive exemplary damage awards."[7] This claim lacks constitutional, analytical, or empirical foundation.

As an initial matter, it is generally *not* the case that even an elaborate system of post-trial review can salvage verdicts obtained on the basis of constitutionally deficient trial procedures. We know of no constitutional principle, for instance, that would excuse a state's failure to afford a person the opportunity to be heard at trial so long as it afforded the defendant a close reading of the record on appeal and a chance to present argument in the course of appellate review. Likewise, this Court has determined that "[r]etrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard." *Santosky v. Kramer*, 455 U.S. 745, 757 (1982). The Court in *Santosky* went on to note that "we would rewrite our precedents were we to excuse a constitutionally defective standard of proof based on an amorphous

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[7] Demarest & Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 St. Mary's L.J. 797, 815-16 (1987) (footnote omitted).

assessment of the 'cumulative effect' of state procedures." *Id.* at 757 n.9 (citation omitted).[8] As in *Santosky*, this Court cannot condone manifold infirmities in this scheme of punishment merely because post-verdict remedies *may* offer *some* salvation in *some* circumstances.[9]

Moreover, where punishment is imposed by a jury without the benefit of standards, allowing judges to review that verdict to determine, for example, if it was "excessive," does little to remedy the underlying defects in the process. The question of excessiveness can only be meaningfully answered by reference to specific facts and relative to some established scale or measure. There will be many situations where an award is not facially excessive (sufficient to inspire outrage and corrective action by a judge) but nonetheless lawless and inappropriate because not supported by clear standards in the first instance.

[8] *Cf. Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 20-21 (1978) (availability of injunction and post-termination remedies for improper stoppage of utility services without notice "would not be an adequate substitute for pre-termination review," since, *inter alia*, injunctive relief "will not provide the same assurance of accurate decisionmaking as would an adequate administrative procedure"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) ("a post-deprivation hearing here would be constitutionally inadequate" to correct for failure to afford timely administrative hearing); *Cuellar v. Texas Empl. Comm'n*, 825 F.2d 930, 936 (5th Cir. 1987) ("The existence of post-deprivation remedies through further administrative hearings, judicial review, or independent state-law based causes of action are irrelevant" to the question of the constitutional adequacy of firing procedures).

[9] Limited exceptions to this principle have no application here. Thus, post-deprivation process may be sufficient in light of "the necessity of quick action by the State." *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Certainly no such urgency can be claimed in the present context. Post-deprivation process may also be adequate in the case of deprivations resulting from "random and unauthorized act[s] by a state employee" given "the impracticality of providing any meaningful predeprivation process" in that instance. *Parratt*, 451 U.S. at 539, 541. But this exception has no force where, as here, the challenge is not to random acts but to "established state procedure[s]." *See Logan*, 455 U.S. at 436 (rejecting analogy to *Parratt* for this reason).

Thus, even if layers of judicial re-evaluation could, in some instances, compensate for procedural deficiencies at trial, the forms of review traditionally available in connection with awards of punitive damages are neither designed nor able to achieve this result. Trial court review of punitive awards is severely circumscribed; a standard formulation is whether an award is "so excessive as to be deemed a product of passion or prejudice . . . ."[10] Although "passion and prejudice" may undoubtedly taint a punitive damages determination,[11] judicial review that focuses on that issue tends to obscure the absence of articulated substantive and evidentiary standards for juries to observe in rendering such awards in the first instance. Therefore, review subject to a "passion or prejudice" or like inquiry may offer a vehicle for remedying injustice in some cases, but will not and cannot correct for institutionalized infirmities such as a lack of underlying legal standards.

Similar limitations characterize appellate review. Indeed, appellate courts are the first to acknowledge their limited capacity to assess the propriety of a punitive award. *See, e.g., Villella*, 543 N.E.2d at 469 ("[because] the trial judge is in the best position to determine whether

[10] *Villella v. Waikem Motors, Inc.*, 45 Ohio St. 3d 36, 543 N.E.2d 464, 469 (1989).

[11] For a court to remit a punitive damages award on the ground that the amount awarded was based on passion and prejudice, but to leave unaltered the jury's findings on liability and compensatory damages, is to act on the untenable assumption that the same jury can be dispassionate and fair when deciding liability and compensatory issues, yet impassioned and prejudiced while contemporaneously deciding punitive damages issues. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 301 (1983).

an award is . . . excessive . . . 'an [a]ppellate court hesitates to enter remittitur'") (citations omitted); *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1378-79 (Ala. 1986); *Robinson v. Mack Trucks, Inc.*, 426 N.W. 2d 220, 226 (Minn. Ct. App. 1988); *Zarrella v. Robinson*, 460 A.2d 415, 419 (R.I. 1983). The result, not surprisingly, is extreme reluctance on the part of appellate courts to trench on, or even conduct meaningful review of, punitive awards. The present case typifies this reluctance: the Alabama Supreme Court's review of the jury's punitive award was confined to the conclusory observation that "jury verdicts are presumed correct, and that presumption is strengthened when the presiding judge refuses to grant a new trial." Slip op. at 13 (App. B to petition for certiorari). Appellate review cannot be a constitutional substitute for inadequate trial court procedures when that review is premised on deference to the jury verdict, irrespective of the fact that the jury verdict was procured unconstitutionally.

Compounding the deficiencies in judicial controls is the fact that judges have no more clearly defined standards for reviewing punitive awards than juries have for pronouncing them.[12] Prevailing standards of review—which, in addition to the "passion or prejudice" standard, include whether an award "shocks the conscience of the court," [13] or whether the punitive award bears a "reason-

[12] The major difficulty in establishing the amount of the punitive damage recovery is the absence of any definitive standard or criterion to guide the trier of fact in determining the proper amount. And since reviewing courts similarly lack any specific standards by which to measure the damages, there is a corresponding difficulty in considering the propriety of such award on appeal . . . .

Leimgruber v. Claridge Assocs., Ltd., 73 N.J. 450, 375 A.2d 652, 656 (1977) (citations omitted).

[13] *E.g., O'Neal Ford, Inc. v. Davie*, 299 Ark. 45, 770 S.W.2d 656, 659 (1989) (quoting *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982)).

able relationship" to the corresponding compensatory award [14]—are themselves vague and subjective. As one commentator long ago observed, such tests are "probably more often a rationalization of results than a means of obtaining them. The proper ratio between actual damages and punitive damages is placed at a figure which supports the judge's view of the verdict. . . ." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1180 (1931). *See also Ace Truck & Equip. Rentals, Inc. v. Kahn*, 746 P.2d 132, 135 (Nev. 1987) (citation omitted) ("one 'cannot avoid thinking' that the [passion or prejudice] rule is 'tailored to fit [the court's] feeling about the particular case before it'").[15] The result, not surprisingly, is sharp and often inexplicable discrepancies between judicial attempts to reduce awards—for instance, from $125 million to $3.5 million (*Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 757, 824-25, 174 Cal. Rptr. 348, 391 (1981)), from $15 million to $7.5 million to $650,000 (*Stambaugh v. International Harvester Co.*, 106 Ill. App.3d 1, 435 N.E.2d 729, 747 (1982), *rev'd on other grounds*, 102 Ill.2d 250, 464 N.E.2d 1011 (1984)), and from $10,000 to $9,999 (*Hanch v. K.F.C. Nat'l Mgmt. Corp.*, 615 S.W.2d 28, 30 (Mo. 1981) (en banc)).[16]

[14] *E.g., Gazette, Inc. v. Harris*, 229 Va. 1, 51, 325 S.E.2d 713, 747, *cert. denied*, 472 U.S. 1032 (1985).

[15] For the Court's convenience, we have attached as an Appendix to this brief an informal survey of the prevailing standards for judicial review of punitive damages awards in the 50 states.

[16] In any event, the fact that appellate courts are deciding issues that have been expressly left within the purview of a jury indicates that such courts are devoting an inordinate amount of time on issues which should have been addressed below. At a time when the appellate court systems are already overburdened, it is neither good sense nor good economy to expect appellate tribunals to correct all deficiencies plaguing trial systems, or to assume the duties of a trial court merely because the latter is not performing them properly.

If remittitur and other methods of trial court control were effective, one would expect a relatively modest incidence of appellate reversals of punitive awards. In fact, a study of all punitive damages awards in product liability cases reviewed by federal appellate courts between 1982 and mid-1985 revealed that sixty-nine percent were reversed or sharply reduced on appeal.[17] Likewise, a more recent study undertaken by the United States General Accounting Office of product liability cases in five states over a two-year period found that (1) appellate courts reversed or remanded for retrials *all* punitive damages awards on which they ruled; (2) 18 of the 22 punitive damages verdicts studied were lowered by some post-trial method; and (3) awards were reduced less often and by a smaller percentage when the verdict included only compensatory damages.[18] The frequency of reversal highlights the fundamentally arbitrary nature of the underlying process and the inability of remittitur alone to compensate for such arbitrariness.

Moreover, none of the existing mechanisms for reviewing punitive awards can remedy the prejudice and costs

[17] *See* Landes & Posner, *New Light on Punitive Damages*, 10 Reg. 33, 34-35 (Sept.-Oct. 1986). In comparison, less than one-third of the trial court decisions in favor of plaintiffs but not awarding punitive damages were reversed on appeal. *Id.* at 35.

[18] United States General Accounting Office, *Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness, Committee on Energy and Commerce: Product Liability: Verdicts and Case Resolution in Five States* 40-47 (1989).

These findings are consistent with similar studies. Thus, the Institute for Civil Justice of The RAND Corporation examined awards of punitive damages in certain civil jury trials concluded in San Francisco County, California, and Cook County, Illinois, between 1979 and 1983. *See* M. Peterson, S. Sarma, & M. Shanley, *Punitive Damages: Empirical Findings* viii (RAND R-3311-ICJ 1987). The Institute determined that post-trial actions reduced punitive damages awards in half of those trials and that, as a result of post-trial action, only half of the money awarded by juries in those cases was actually received by plaintiffs. *Id.*

that often befall the target of a punitive award irrespective of the success of later appeals. For example, in order even to maintain an appeal of an excessive punitive damages award, a defendant may be required to post a supersedeas bond which may necessitate the defendant's liquidation.[19] Likewise, the defendant may have to place its property in receivership pending appeal, thereby crippling its ability to carry on as a viable entity.[20] Equally damaging could be a severe drop in the price of a defendant's stock in response to an excessive punitive award.[21] And an erroneous punitive damages award could so malign the reputation of a company or product that the defendant would cease making or marketing the product even if the punitive award were later reduced.[22] These "real life" illustrations demonstrate that judicial

[19] *See Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250 (S.D.N.Y.), *aff'd in part and rev'd in part*, 784 F.2d 1133 (2d Cir. 1986), *rev'd*, 481 U.S. 1 (1987); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987). In *Pennzoil*, the appellate court ultimately determined that the punitive damages award was three times as great as it should have been.

[20] *See George v. International Society for Krishna Consciousness of California*, 262 Cal. Rptr. 215, 216 (Cal. App. 1989). In *Krishna Consciousness*, the trial court reduced the jury's award of $32 million to $9.7 million, and the court of appeals further reduced it to $2.9 million.

[21] *See, e.g.*, United Press International news release, keyword: Snapon (Nov. 22, 1989).

[22] *See* United Press International news release, keyword: Bendectin (Mar. 9, 1990). Recently, the Monsanto Company, a chemical and drug producer, cancelled its plans to market a fiber claimed to be an effective substitute for asbestos but lacking the health risks associated with asbestos. Monsanto cited as the reason for its decision the belief that its product would nevertheless attract lawsuits from trial attorneys who make their living by suing asbestos companies. *N.Y. Times*, May 19, 1990, at 50, col. 3. This unfortunate decision was predictable: it is logical that the manufacturer of any asbestos substitute, however safe, might cancel plans to market the product because "[a] whole generation of lawyers has been schooled in asbestos liability theories that could

review is "apt to be a lengthy and speculative process, which . . . [may] never make the complainant entirely whole." *Logan*, 455 U.S. at 436-37. Such review cannot substitute for timely procedural safeguards. *Id.*

Finally, reliance on broad review mechanisms, which allow a court to substitute its judgment for that of the jury, denigrates the central role of juries in our system of jurisprudence. If, as appears to be the premise of private punitive damages regimes, it is the jury's responsibility to impose civil punishment, this goal is severely undercut by wholesale dependence on remittitur and other review devices. *Amici* suggest that the solution to inappropriate punitive awards is not to count on judges to correct them, but to provide juries with proper guidelines to enable them to carry out their historic duties in the first instance.

Judicial review can supplement, but cannot substitute for, institutionalized processes to protect the defendant at trial. Existing review procedures are stop-gap measures that, however well-intended, serve only to obscure the magnitude of the problems plaguing the underlying punitive damages schemes. This is not to discount the critical role played by judges in attempting to provide some check on the unbridled discretion of juries to impose punitive damages. It is to suggest, however, that post-verdict review offers the civil defendant too little, too late to satisfy due process.

II. DUE PROCESS REQUIRES THAT PUNITIVE DAMAGES AWARDS BE SUPPORTED, AT A MINIMUM, BY CLEAR AND CONVINCING EVIDENCE

In assessing punitive damages against petitioner in this case, the Alabama jury was left free to impose punitive damages in any amount so long as it was "reason-

possibly be turned against this or any similar substitute." Mahoney & Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCIENCE 1395 (Dec. 15, 1989).

ably satisfied from the evidence" that a fraud had been perpetrated, and felt, in the exercise of its "discretion," that punishment was in order.[23] This cryptic formulation of the burden of proof is akin to the "preponderance of the evidence" standard normally applied in civil cases. And we take it as clear that it is less exacting than the "clear and convincing evidence" standard presently applied in at least twenty-two states, including, now, Alabama itself, before punitive damages may be imposed.[24] This case thus squarely presents the question whether the Due Process Clause of the Fourteenth Amendment is satisfied by a standard of proof for punitive damages less demanding than clear and convincing evidence.

Amici submit that due process requires more. In determining whether due process mandates a burden of

[23] The Alabama trial court's full charge to the jury on punitive damages is included in petitioner's brief.

[24] At lease nineteen states have enacted legislation requiring that punitive awards be supported by clear and convincing evidence. *See* Ala. Code § 6-11-20(a) (Supp. 1989); Alaska Stat. § 09.17.020 (Supp. 1988); Cal. Civ. Code § 3294(a) (West Supp. 1990); Fla. Stat. Ann. § 768.73(1)(b) (West Supp. 1989); Ga. Code Ann. § 51-12-51(b) (Supp. 1989); Ind. Code Ann. § 34-4-34-2 (Burns 1986); Iowa Code Ann. § 668A.1(1)(a) (West Supp. 1989); Kan. Civ. Proc. Code Ann. § 60.3701(c) (Vernon Supp. 1989); Ky. Rev. Stat. Ann. § 411.184(2) (Michie/Bobbs-Merrill 1988); Minn. Stat. Ann. § 549.20 subdivision 1 (West 1988); Mont. Code Ann. § 27-1-221(5) (1987); Nev. Rev. Stat. Ann. § 42.005(1) (Michie Supp. 1989); N. Dak. Cent. Code § 32-03.2-11 (Supp. 1987); Ohio Rev. Code Ann. § 2307.80 (Anderson 1987); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. § 41.315(1) (1987); S.C. Code Ann. § 15-33-135 (Law. Co-op. Supp. 1989); S. Dak. Codified Laws Ann. § 21-1-4.1 (1987 Rev.); Utah Code Ann. § 78-18-1(a) (1989). Three other states have adopted this burden of proof as a matter of common law. *See Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986) (en banc); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W. 2d 437 (1980). A twenty-third state has by legislation subjected punitive damages to the even more demanding "beyond a reasonable doubt" burden of proof. Colo. Rev. Stat. § 13-25-127(2) (Supp. 1979).

proof more demanding than the "preponderance of the evidence" standard applied in most civil cases,[25] this Court "has engaged in a straightforward consideration" of the factors identified in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Santosky v. Kramer*, 455 U.S. at 754 (applying *Eldridge* factors to New York parental termination scheme). That is, the Court has looked to "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedures." *Id. See also Eldridge*, 424 U.S. at 335 (identifying factors); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (same).

In the context of Alabama's punitive damages scheme in particular, and punishment in general, the private interest at stake—the interest in avoiding erroneously imposed punishment—is considerable; the risk of error is very substantial; and there is no countervailing governmental interest. Under settled due process analysis, therefore, punitive damages cannot be administered absent, at least, clear and convincing evidence.

1. The first due process consideration turns on "the nature of the private interest threatened . . . ." *Santosky*, 455 U.S. at 758. *Cf. Addington*, 441 U.S. at 425 (considering "extent of the individual's interest"). Concededly, the monetary nature of punitive awards would not, standing alone, pose as dire a threat to the civil defendant as, say, civil commitment (*Addington*, 441 U.S. at 425-26) or deportation (*Woodby v. INS*, 385 U.S. 276, 285 (1966)).

[25] *See Rivera v. Minnich*, 483 U.S. 574, 577 (1987) ("The preponderance of the evidence standard . . . is the standard that is applied most frequently in litigation between private parties in every State"); E. Cleary, *McCormick on Evidence* § 339, at 956 (3d ed. 1984) (preponderance standard governs "the general run of issues in civil cases").

But punitive damages are imposed to punish. They are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Welch, Inc.*, 418 U.S. 323, 350 (1974). *See also* W. Prosser, J. Wade & V. Schwartz, *Cases And Materials On Torts*, 528-29 (8th ed. 1988) (punitive damages "are awarded . . . for the purpose of punishing the defendant, of admonishing him not to do it again, and of deterring others from following his example"); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852) ("By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured"); *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2926 (1989) (O'Connor, J., concurring in part, dissenting in part) ("punitive damages serve the same purposes—punishment and deterrence—as the criminal law").[26] In meting out punishment, society registers a moral judgment about the character of the punished individual.[27] Our jurisprudence has historically required that such solemn decisions be made only with the utmost care and circumspection. It is for this reason that a heightened burden of proof is "critical [to] the moral force of the criminal law" (*In re Winship*, 397 U.S. 358, 364 (1970)), just as it is in other circumstances in which punishment is imposed, *id.* at 365 ("The same con-

[26] In assessing the character and gravity of a sanction, "the labels 'criminal' and 'civil' are not of paramount importance." *United States v. Halper*, 109 S. Ct. at 1901. Likewise, it has long been recognized that whether a sanction serves a reparative or punitive purpose "is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U.S. 603, 611 (1881).

[27] Punitive damages arising from tortious injury virtually always entail an element of opprobrium. The same is not true of most civil fines. Civil fines are generally imposed for failure to adhere to strict, clearly defined standards that govern one's trade or business, often irrespective of moral culpability.

siderations . . . demand extreme caution" in juvenile proceedings, whether they be characterized as criminal or civil).

The interest implicated by punitive awards is defined not merely by their purpose, but by their consequences as well. Like other forms of punishment, punitive damages are by their nature designed to "engender adverse social consequences" (*Addington*, 441 U.S. at 425-26 (describing effect of civil commitment)), including, in many instances, debilitating stigma. Courts and commentators alike have emphasized the "potentially devastating" ramifications of an award of punitive damages for the character, reputation, business and good will of the civil defendant. *Browning-Ferris*, 109 S. Ct. at 2923 (Brennan, J., concurring). *See, e.g., International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979) ("the impact of [punitive awards] is unpredictable and potentially substantial"); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chic. L. Rev. 408, 417 (1967) (citation omitted) (punitive awards have " 'momentous and serious' . . . consequences" for civil defendant); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 842 (2d Cir. 1967) (Friendly, J.) (noting "serious" consequences for defendant of punitive award).

The private interest at stake is thus far more than "mere loss of money." *Addington*, 441 U.S. at 424. Simply put, punishment is different. *See Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414, 1419 (5th Cir. 1990) (Jones, J., dissenting from denial of rehearing *en banc*) ("The goal of punishment critically distinguishes punitive damages from other common law remedies . . ."). Indeed, this Court has recognized that the heightened "clear and convincing evidence" standard is often imposed to "reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." *Addington*, 441 U.S. at 424. *See also In re Winship*, 397 U.S. at 363 (heightened standard required

in criminal cases in part because of "the certainty that [the accused] would be stigmatized by the conviction"). *Accord Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) ("where the State attaches 'a badge of infamy' to the citizen, due process comes into play").

That a civil defendant's reputation stands to be tarnished, often irrevocably, by a punitive award is undeniable. This interest thus demands the high level of care and certainty that our legal tradition has traditionally demanded where punishment is to be inflicted and society's moral opprobrium meted out.[28] The first *Eldridge* factor, then, weighs in favor of a burden of proof more exacting than "reasonably satisfied from the evidence" or "preponderance of the evidence."

2. The state's interest in punishing and deterring wrongful behavior—the second factor to be considered under *Eldridge*—cannot be gainsaid. On the other hand, the state's interest in imposing punishment based merely on a "preponderance of the evidence" is slight, at best. Of the forty-five states that permit awards of punitive damages,[29] more than half—including now, Alabama

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[28] It is true, of course, that there are situations in which we tolerate awards with some extra-compensatory character, and do not impose a burden of proof higher than "preponderance of the evidence." For example, treble damages are imposed for antitrust violations. But in antitrust cases, the *jury* determines *compensation*. Trebling reflects the decision of the legislature, not the jury. Where strict ceilings on punishment are clearly set by statute, it may well be that the need for an elevated standard of proof is less. But here, where unlimited punishment may be imposed purely as a matter of the decisionmaker's discretion, the need for an elevated standard of proof is clear.

[29] Five states have outlawed punitive awards altogether absent explicit statutory authorization. *See Ricard v. State*, 390 So. 2d 882, 884 (La. 1980) (Louisiana); *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 47 N.E.2d 265 (1943) (Massachusetts); *Abel v. Conover*, 104 N.W.2d 684 (Neb. 1960) (Nebraska);

itself—already impose a stricter standard of proof without any appreciable effect on their ability to deter or punish wrongful behavior. *See supra* n.24 (enumerating states imposing higher burden). *Cf. Santosky*, 455 U.S. at 767 (observing no perceptible effect of higher standard of proof on efficacy of civil commitment proceedings). Moreover, this Court has observed that "States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz*, 418 U.S. at 349. The added certainty afforded by a higher standard of proof—the assurance that the defendant being punished actually deserves to be punished—neither disparages the state's interest in punishment nor undermines the state's ability to punish when punishment is properly due.

While states indisputably have an interest in punishing those who actually engage in reprehensible conduct, they have no interest in blemishing the reputation and character of business entities or individuals which have *not* engaged in wrongful behavior. Because standards of proof less exacting than "clear and convincing evidence" increase the risk of wrongfully imposing society's wrath on innocent defendants, "it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such" circumstances. *Addington*, 441 U.S. at 426.

3. Finally, the Court has historically considered the risk of error associated with use of a chosen standard of proof, and whether that risk is constitutionally tolerable in the given context. *Santosky*, 455 U.S. at 761; *Eldridge*, 424 U.S. at 344-45. It has long been recognized that adopting a standard of proof "is more than an empty semantic exercise" (*Addington*, 441 U.S. at 425 (citation omitted)), and indeed reflects ultimate societal

N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988) (New Hampshire); *Kammerer v. Western Gear Corp.*, 618 P.2d 1330, 1337 (Wash. 1980) (Washington).

judgments about competing outcomes. *See Santosky*, 455 U.S. at 766-67; *In re Winship*, 397 U.S. at 363; *Addington*, 441 U.S. at 427.[39] Imposition of any standard less exacting than "clear and convincing evidence" embodies at least three societal judgments, none of which accurately reffects society's purpose in imposing *punitive* damages.

First, the preponderance standard embodies a notion of equipoise: it suggests that society is content to let the competing litigants "share the risk of error in roughly equal fashion." *Addington*, 441 U.S. at 423. *See also In re Winship*, 397 U.S. at 371 (Harlan, J., con-

[39] In particular, the difference between the preponderance and clear and convincing standards, while "quantitatively imprecise" (*In re Winship*, 397 U.S. at 370 (Harlan, J., concurring)), is nevertheless fundamental. In a nutshell, the preponderance standard merely requires the trier of fact "'to believe that the existence of a fact is more probable than its nonexistence . . . .'" *Id.* at 371 (quoting F. James, *Civil Procedure* 250-51 (1965)). Because this standard by its terms measures the quantity, rather than the quality, of the evidence presented, it is more likely to "misdirect the factfinder in the marginal case." *Santosky*, 455 U.S. at 764. This is because the preponderance standard may lead the jury "merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater *quantum*, without regard to its effect in convincing [the] mind of the truth of the proposition asserted." *In re Winship*, 397 U.S. at 368 (emphasis added) (citation omitted). *See also Addington*, 441 U.S. at 426 ("the preponderance standard creates the risk of increasing the number of individuals erroneously committed").

Conversely, the clear and convincing standard by its terms focuses attention on the *quality* of the evidence, requiring in particular "a firm belief or conviction as to the allegations sought to be established." *Hobson v. Eaton*, 399 F.2d 781, 784 n.2 (6th Cir. 1968) (quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954)). *See also* E. Cleary, *McCormick on Evidence* § 340, at 959-60 (clear and convincing standard requires that truth of allegation be "highly probable") (citation omitted). This standard thus mandates a degree of confidence in a chosen outcome greater than the slightly better than average certainty embodied in a preponderance standard.

curring) (use of the preponderance standard suggests that "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor"); *Rivera*, 483 U.S. at 581 (preponderance standard is appropriate in context of paternity suits since each party "has an extremely important, but nevertheless relatively equal, interest in the outcome"). In short, the preponderance standard embodies the belief that, as between two competing parties, each possesses a presumptively equal claim to the money or other interests at stake between them.

Such a presumption has no place in the context of punitive damages. Any award the plaintiff receives in the form of exemplary damages constitutes a "windfall recover[y]" over and above the damages required to make him whole. *Foust*, 442 U.S. at 50. *See also Gertz*, 418 U.S. at 349 (characterizing punitive damages as "gratuitous awards" to plaintiffs). Conversely, as discussed above, the prejudice befalling a civil defendant erroneously saddled with a punitive award is grave, and his interest in avoiding such a result is correspondingly strong. It cannot accurately be said, therefore, that each party to a case involving punitive damages "would suffer in a similar way the consequences of an adverse ruling . . . ." *Rivera*, 483 U.S. at 581 (endorsing preponderance standard for paternity suits).

Second, by subjecting awards of punitive damages to the same standard as awards of compensation, we imply that both types of awards stand on an equal footing. But we have long accepted the notion that when the state exercises its power to punish, it is engaged in a qualitatively different type of process than when it seeks merely to resolve a private dispute. The gravity of the former inquiry underlies the criminal law's exacting "beyond a reasonable doubt" standard. *See In re Winship*, 397 U.S. at 363 (heightened standard of proof is "a prime instrument for reducing the risk of convictions

resting on factual error"). It is also the reason why, at the very least, the intermediate "clear and convincing evidence" standard is appropriate for "civil cases involving . . . quasi-criminal wrongdoing by the defendant." *Addington*, 441 U.S. at 424 (discussing civil fraud). *See also Simpson v. Pittsburgh Corning Corp.*, No. 89-7742 (2d Cir. April 16, 1990) (same). Conversely, the Court has held that civil commitment proceedings need not be governed by the high criminal law standard precisely because "[i]n a civil commitment state power is not exercised in a *punitive* sense." *Addington*, 441 U.S. at 428 (emphasis added).

In the context of punitive damages, state power is by definition being exercised "in a punitive sense." *Id.* When a jury administers the "extraordinary sanction" of punitive damages (*Foust*, 442 U.S. at 48), it is plainly making a decision about quasi-criminal wrongdoing. Such a determination is far more consequential, and thus must be based on far greater certainty, than an ordinary civil verdict.

Third, the preponderance standard reflects a willingness in a given setting to tolerate a rate of error only slightly better than equipoise. As applied to punitive damages, such a standard suggests that we, as a people, are satisfied if punishment is inflicted on the basis of no better than fifty-one percent probability. *See, e.g., United States v. Fatico*, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). Punishment meted out on the basis of marginal determinations of wrongdoing quickly lose their moral force, and come to be regarded as capricious and unjust. Likewise, a would-be deterrent meted out on the basis of caprice ceases to serve as a meaningful deterrent, for it fails to be regarded as providing a clear standard upon which to base one's conduct.

* * * *

The "logical conclusion of this balancing process" (*Santosky*, 455 U.S. at 768) is that due process requires that

punitive damages awards be supported by at least clear and convincing evidence.[31] The requirement that punitive damages awards be premised upon a convincing and clear factual foundation will serve both practical and symbolic purposes. *See Addington*, 441 U.S. at 426 ("standards of proof are important for their symbolic meaning as well as for their practical effect").

Where, as in Alabama, the burden for establishing punitive awards has traditionally been the same as for any other civil award, a stricter standard of proof would convey to the judge and jury in dramatic fashion the fundamental difference between an award of compensatory relief and an award of exemplary damages. Raising the burden of proof is "one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate [decisions] will be ordered." *Addington*, 441 U.S. at 427. Simply put, an elevated standard of proof will put juries on notice that in awarding punitive damages they are no longer dealing with a simple question of compensation.[32]

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[31] The manifest parallels between a punitive award and a criminal penalty support application to the former of the higher "beyond a reasonable doubt" standard of proof applied in the criminal law. The reasonable doubt standard would afford an appropriately high degree of certainty that punishment is being properly inflicted. *See In re Winship*, 397 U.S. at 364. At a minimum, clear and convincing evidence is constitutionally required. Of course, the Constitution only prescribes "minimum requirements [of due process as] a matter of federal law." *Vitek v. Jones*, 445 U.S. 480, 491 (1980). It in no way pretermits efforts by states to fashion more rigorous procedural safeguards. Thus, the states are always free to subject punitive awards to the reasonable doubt standard, as at least one state has already done. *See* Colo. Rev. Stat. § 13-25-127(2) (Supp. 1979).

[32] As a practical matter, the risk of error and confusion is great where the jury is *simultaneously* asked to address issues of compensation and punishment. It is certainly implicit to the jury that in awarding compensation it is choosing between two equal claimants to the money at stake: The jury is not blind to plaintiff's need. A stricter standard will communicate to the jury that punishment involves an entirely separate and far graver inquiry, focusing more sharply and narrowly on defendant's culpability.

Rather, they are meting out punishment, and hence are making peculiarly sacrosanct decisions on behalf of society.

In addition, the clear and convincing standard will better allow judges of both trial and appellate courts to parse those cases which create a jury issue of punitive damages from those which do not. It can provide a court with legitimate tools to determine (rather than simply declare) whether a resulting award is, indeed, based upon and supported by *facts* and *evidence*, rather than the product of passion, prejudice, and the rhetoric of sophisticated advocacy. In short, it provides a necessary means of protecting defendants from the dangers inherent in this unusual civil system of punishment, and ensuring that the system attains some measure of fairness and legitimacy.

CONCLUSION

The availability of judicial review offers no constitutional salvation for standardless punitive damages schemes. An elevated burden of proof, while also not a panacea, is a necessary component of the process constitutionally due civil defendants before they may be subjected to punishment.

Respectfully submitted,

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APPENDIX

APPENDIX

STANDARDS FOR REMITTITUR AND APPELLATE REVIEW OF JURY AWARDS OF PUNITIVE DAMAGES IN THE FIFTY STATES

ALABAMA

(a) No presumption of correctness shall apply as to the amount of punitive damages awarded by the trier of the fact.

(b) In all cases wherein a verdict for punitive damages is awarded, the trial court shall, upon motion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages. Any relevant evidence, including but not limited to the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether or not the defendant has been guilty of the same or similar acts in the past, the nature and the extent of any effort the defendant made to remedy the wrong and the opportunity or lack of opportunity the plaintiffs gave the defendant to remedy the wrong complained of shall be admissible. . . . After such post verdict hearing the trial court shall independently (without any presumption that the award of punitive damages is correct) reassess the nature, extent and economic impact of such an award of punitive damages, and reduce or increase the award if appropriate in light of all the evidence.

Ala. Code § 6-11-23 (1989).

(a) On appeal, no presumption of correctness shall apply to the amount of punitive damages awarded.

(b) The appellate court shall independently reassess the nature, extent and economic impact of such an

award and reduce . . . the award if appropriate in light of all the evidence.

Ala. Code § 6-11-24 (1989).

ALASKA

"A punitive damage award is excessive if it is manifestly unreasonable, resulting from passion or prejudice or disregard of the rules of law. Relevant factors include the compensatory damage amount, magnitude of the offense, importance of the policy violated, and the defendant's wealth."

Alaskan Village, Inc. v. Smolley, 720 P.2d 945, 949 (Alaska 1986) (citations omitted).

ARIZONA

"The appropriate test of passion or prejudice is whether the verdict is 'so manifestly unfair, unreasonable and outrageous as to shock the conscience of the court.' 'The test to be applied . . . is whether the "verdict is so outrageously excessive as to suggest, at first blush, passion or prejudice."' "

Hawkins v. Allstate Ins. Co., 152 Ariz. 490, 733 P.2d 1073, 1084 (1987) (quoting *Acheson v. Shafter*, 107 Ariz. 576, 579, 490 P.2d 832, 835 (1971) and *Wry v. Dial*, 18 Ariz. App. 503, 515, 503 P.2d 979, 991 (1972)), *cert. denied*, 484 U.S. 874 (1987)).

ARKANSAS

"[T]he standard for determining whether a damage verdict is excessive is 'whether it shocks the conscience of the court or demonstrates that jurors were motivated by passion or prejudice.' "

O'Neal Ford, Inc. v. Davie, 299 Ark. 45, 770 S.W.2d 656, 659 (1989) (quoting *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982)).

Morrison v. Lowe, 274 Ark. 358, 625 S.W.2d 452, 455 (1981).

CALIFORNIA

"[O]ur review of punitive damage awards rendered at the trial level is guided by the 'historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice. . . .' . . . [A]n appellate court may reverse such an award 'only "when the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice."' "

Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 928-29, 582 P.2d 980, 990, 148 Cal. Rptr. 389, 399 (1978) (quoting *Bertero v. National Gen. Corp.*, 13 Cal. 3d 43, 65, 529 P.2d 608, 624, 118 Cal. Rptr. 184, 200 (1974) and *Schroeder v. Auto Driveaway Co.*, 11 Cal. 3d 908, 919, 523 P.2d 662, 669, 114 Cal. Rptr. 622, 629 (1974)) (footnote and citations omitted).

COLORADO

"'[A]bsent an award so excessive . . . as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.' "

Higgs v. District Ct. In and For Douglas County, 713 P.2d 840, 860-62 (Colo. 1985) (quoting *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 503 (10th Cir. 1984) (quoting *Barnes v. Smith*, 305 F.2d 226, 228 (10th Cir. 1962)) and *Frick v. Abell*, 198 Colo. 508, 512, 602 P.2d 852, 854 (1979)) (citations omitted).

"[T]he court may reduce or disallow the award of exemplary damages to the extent that:

(a) The deterrent effect of the damages has been accomplished; or

(b) The conduct which resulted in the award has ceased; or

(c) The purpose of such damages has otherwise been served.

Colo. Rev. Stat. § 13-21-102(2) (1989).

CONNECTICUT

"'Punitive damages . . . are restricted to cost of litigation less taxable costs of the action being tried and not that of any former trial. . . .'"

Alaimo v. Royer, 188 Conn. 36, 448 A.2d 207, 209-10 (1982) (quoting *Vandersluis v. Weil*, 176 Conn. 353, 358-59, 407 A.2d 982, 986 (1978)) (citations omitted); *Accord Holbrook v. Casazza*, 204 Conn. 336, 528 A.2d 774, 785 (1987), *cert. denied*, 484 U.S. 1006 (1988).

DELAWARE

"'A verdict will not be disturbed as excessive unless it is so clearly so as to indicate that it was the result of passion, prejudice, partiality, or corruption; or that it was manifestly the result of disregard of the evidence or applicable rules of law. A verdict should not be set aside unless it is so grossly excessive as to shock the Court's conscience and sense of justice; and unless the injustice of allowing the verdict to stand is clear.'"

Cloroben Chem. Corp. v. Comegys, 464 A.2d 887, 892 (Del. 1983) (quoting *Riegel v. Aastad*, 272 A.2d 715, 718 (Del. 1970)).

FLORIDA

(1) (a) In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty that involves willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant shall not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b). However, this subsection does not apply to any class action.

(b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and defendant shall be entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact.

Fla. Stat. Ann. § 768.73(1)(a), (b) (West 1989).

(1) In any action to which this part applies wherein the trier of fact determines that liability exists on the part of the defendant and a verdict is rendered which awards money damages to the plaintiff, it shall be the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is excessive . . . in light of the facts and circumstances which were presented to the trier of fact.

. . . .

(5) In determining whether an award is excessive . . . in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any, that such award exceeds a reasonable range

of damages . . . the court shall consider the following criteria:

> (a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;
>
> (b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amount of damages recoverable;
>
> (c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;
>
> (d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and
>
> (e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

Fla. Stat. Ann. § 768.74(1), (5) (West 1989).

GEORGIA

> "Trial courts are authorized to set aside arbitrary verdicts under OCGA § 51-12-12: 'The question of damages is one for the jury; and the court should not interfere with the jury's discretion unless the damages are . . . so excessive as to justify the inference of gross mistake or undue bias,' or, if requested by a proper motion for new trial under OCGA § 5-5-20, '. . . when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury.' . . . The appellate court

> will not disturb the award 'absent an award so excessive . . . as to shock the judicial conscience.' "
>
> *Hospital Auth. of Gwinnett County v. Jones*, 259 Ga. 759, 386 S.E.2d 120, 125-26 (1989) (quoting *Davis v. Glaze*, 182 Ga. App. 18, 23, 354 S.E.2d 845, 851 (1987)).

HAWAII

> "The test on appellate review as to whether the damages awarded by the jury were excessive is whether the award was 'palpably not supported by the evidence, or so excessive and outrageous when considered with the circumstances of the case as to demonstrate that the jury in assessing damages acted against rules of law or suffered their passions or prejudices to mislead them.' "
>
> *Kang v. Harrington*, 59 Haw. 652, 587 P.2d 285, 292 (1978) (quoting *Vasconcellos v. Juarez*, 37 Haw. 364, 366 (1946)).

IDAHO

> " '[O]ur power over excessive damages exists only when the facts are such that the excess appears as a matter of law or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury.' "
>
> *Dinneen v. Finch*, 100 Idaho 620, 603 P.2d 575, 579 (1979) (quoting *Mendenhall v. MacGregor Triangle Co.*, 83 Idaho 145, 150-51, 358 P.2d 860, 862-63 (1961)); *accord Soria v. Sierra Pac. Airlines, Inc.*, 111 Idaho 594, 726 P.2d 706, 720 (1986).

ILLINOIS

> "A reviewing court will not disturb an award of punitive damages on grounds that the amount is ex-

cessive unless it is apparent that the award is the result of passion, partiality, or corruption."

Deal v. Byford, 127 Ill. 2d 192, 130 Ill. Dec. 200, 537 N.E.2d 267, 272 (1989) (citations omitted).

INDIANA

" 'Damages are not [to be] considered excessive unless at first blush they appear outrageous and excessive or it is apparent that some improper element was taken into account by the jury in determining the amount.' "

Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845, 849 (1977) (quoting *City of Indianapolis v. Stokes*, 182 Ind. 31, 105 N.E. 477, 479 (1914)).

"We will not reverse an award of damages as being excessive unless the damages appear so unreasonable as to convince us the jury was motivated by passion or prejudice."

Archem, Inc. v. Simo, 549 N.E.2d 1054, 1061 (Ind. App. 1990) (citation omitted).

IOWA

"No remittitur is permitted in this state if punitive damages awarded are found to be excessive."

Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 861 (Iowa 1973).

"However, we may set a punitive damage verdict aside entirely upon proper circumstances."

Team Cent., Inc. v. Teamco, Inc., 271 N.W.2d 914, 926 (Iowa 1978).

KANSAS

"The award of punitive damages will not be set aside unless the trial judge finds that the award (1) was based on passion, prejudice or bias; (2) was based on mistake of law or fact; or (3) lacked evidentiary support."

"Where a verdict is so excessive and out of proportion to the damages sustained as to shock the conscience of the court and judgment has been entered, the trial judge may tentatively affirm the judgment, provided that the plaintiff will accept a reduced judgment, or may grant a new trial . . . ."

"[I]f the appellate court determines the trial court did not abuse its discretion in affirming the award of punitive damages, but the award is so excessive and out of proportion as to shock the conscience of the appellate court, the appellate court may tentatively affirm the judgment and allow the plaintiff to either accept a reduced amount or be granted a new trial on the issue of punitive damages. . . ."

Folks v. Kansas Power & Light Co., 243 Kan. 57, 755 P.2d 1319, 1335-36 (1988) (citation omitted).

KENTUCKY

"We have no power to correct the excessive award by remittitur. It is only where the items constituting the damages recovered are separable so that the court may eliminate those not properly recoverable from those which are recoverable that a remittitur may be ordered."

Louisville & N.R. Co. v. Complete Auto Transit, Inc., 259 S.W.2d 483, 484 (Ky. App. 1953) (citations omitted).

"[T]he standard for deciding excessiveness which applies to the trial court's responsibility when called upon to decide whether to grant a new trial on

grounds of excessiveness, which is whether the award appears 'to have been given under the influence of passion or prejudice.' " . . . The appellate court will reverse only when it can be said that the trial court has 'clearly erred,' i.e., abused its discretion, in refusing to set aside the award as excessive."

Fowler v. Mantooth, 683 S.W.2d 250, 253 (Ky. 1984) (quoting CR 59.01(d) and *Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky. 1984)).

"The test [of excessiveness of an award of punitive damages] for the trial court is often styled 'the first blush rule.' "

First & Farmers Bank of Somerset, Inc. v. Henderson, 763 S.W.2d 137, 142 (Ky. App. 1988) (quoting *Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky. 1984)).

LOUISIANA

"It is well settled in our jurisprudence that the trial court is granted much discretion in the awarding of damages, and its determination will not be disturbed absent manifest abuse of that discretion. Before a damage award may be questioned as . . . excessive, the appellate court must look to the individual circumstances of the particular case to determine whether the award was a clear abuse of the trier of fact's great discretion."

Bauer v. White, 532 So. 2d 506, 510 (La. App. 1988) (citing *Reck v. Stevens*, 373 So. 2d 498 (La. 1979)).

MAINE

" 'The award of punitive damages . . . is within the sound discretion of the fact finder after weighing all relevant aggravating and mitigating factors.' "

Goucher v. Dinneen, 471 A.2d 688, 689 (Me. 1984) (quoting *Hanover Ins. Co. v. Hayward*, 464 A.2d 156, 158 (Me. 1983)).

MARYLAND

"[O]rdinarily[,] excessive damages are not a matter for review by the appellate court."

J.C. Penney Co. v. Harker, 23 Md. App. 121, 326 A.2d 228, 231 (1974).

"The Court of Appeals has frequently reiterated its determined disinclination to review the amount of a jury's award of damages in a tort action. . . . 'We know of no case where this Court has ever disturbed the exercise of the lower court's discretion in denying a motion for new trial because of the . . . excessiveness of damages.' "

Carl M. Freeman Assocs., Inc. v. Murray, 18 Md. App. 419, 306 A.2d 548, 552 (1973) (quoting *Kirkpatrick v. Zimmerman*, 257 Md. 215, 218, 262 A.2d 531, 532 (1970)).

MASSACHUSETTS

" '[I]n deciding whether a jury award is excessive . . . the trial judge has his traditional discretion, and his view that the jury verdict should stand would generally be respected by an appellate court, at least where damages were unliquidated.' "

Magaw v. Massachusetts Bay Transp. Auth., 21 Mass. App. 129, 485 N.E.2d 695, 700 (1985) (quoting *Griffin v. General Motors Corp.*, 380 Mass. 362, 371, 403 N.E.2d 402, 408 (1980)).

MICHIGAN

"In reviewing the decision of a trial judge to either grant or deny remittitur or grant a new trial, we

must determine whether there has been an abuse of discretion. A reviewing court will only substitute its judgment for that of the trier of fact where a verdict has been secured by improper methods, prejudice, or sympathy, or where it is so excessive as to 'shock the judicial conscience'."

Green v. Evans, 156 Mich. App. 145, 401 N.W.2d 250, 255 (1985) (citations omitted) (quoting *Gillispie v. Board of Tenant Affairs of the Detroit Hous. Comm'n*, 122 Mich. App. 699, 704, 332 N.W.2d 474, 476 (1983)).

MINNESOTA

"The trial court's denial of a remittitur may be reversed only where there has been a clear showing of an abuse of discretion . . . ."

"The trial court, having heard the testimony and observed the parties and witnesses, is in a better position than this court to determine whether the damages were given under the influence of passion and prejudice, and in the absence of a clear abuse of that discretion its action will not be reversed."

Robinson v. Mack Trucks, Inc., 426 N.W.2d 220, 226 (Minn. App. 1988).

MISSISSIPPI

"Our general rule is that a damage award is so excessive that it should be altered or amended when it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience. This shock must be experienced by the judicial conscience, not the actual conscience of the members of this Court."

Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 278, (Miss. 1985) (citations omitted), *aff'd*, 486 U.S. 71 (1988).

MISSOURI

Remittitur was abolished in *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. 1985) because it "permits the trial court to find error in its trial and excuse the error upon remittitur of a commanded portion of the jury's verdict, only to see the case appealed despite the remittitur, including a charge of error in the amount of remittitur ordered."

The court's ability to order remittitur in cases involving punitive damages was reinstated by RSMo § 510.263.6 (1988) ("The doctrines of remittitur and additur, based on the trial judge's assessment of the totality of the surrounding circumstances, shall apply to punitive damage awards"). This statute has not yet been interpreted or challenged in a published decision.

MONTANA

(b) When an award of punitive damages is made by the judge, he shall clearly state his reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of the following matters:

(i) the nature and reprehensibility of the defendant's wrongdoing;

(ii) the extent of the defendant's wrongdoing;

(iii) the intent of the defendant in committing the wrong;

(iv) the profitability of the defendant's wrongdoing, if applicable;

(v) the amount of actual damages awarded by the jury;

(vi) the defendant's net worth;

(vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;

(viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and

(ix) any other circumstances which may operate to increase or reduce, without wholly defeating, punitive damages.

(c) The judge shall review a jury award of punitive damages, giving consideration to each of the matters listed in subsection (7)(b). If after review the judge determines that the jury award of punitive damages should be . . . decreased, he may do so. The judge shall clearly state his reasons for . . . decreasing, or not . . . decreasing the punitive damages award of the jury in findings of fact and conclusions of law, demonstrating consideration of each of the factors listed in subsection (7)(b).

Mont. Code Ann. § 27-1-221(7)(b), (c) (1989).

NEBRASKA

Punitive damages are not allowed. *See Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960).

NEVADA

"NRCP 59 includes as grounds for a new trial 'excessive damages appearing to have been given under the influence of passion or prejudice.' . . . [T]he assessing of punitive damages is wholly subjective. There are no objective standards by which the monetary amount can be calculated. The concept of punitive damages rests upon a presumed public policy to punish a wrongdoer for his act and to deter others from acting in similar fashion. The punitive allowance should be in an amount that would promote the public interest without financially annihilating the defendant. The wrongdoer may be punished but not destroyed."

Caple v. Raynel Campers, Inc., 90 Nev. 341, 526 P.2d 334, 336-37 (1974).

NEW HAMPSHIRE

Punitive damages are not allowed. N.H. Rev. Stat. Ann. § 507:16 (1988).

NEW JERSEY

"This Court has held that verdicts should be upset for being excessive only in clear cases, that damage awards will not be set aside unless so excessive as irresistibly to give rise to the inference of mistake, passion, prejudice or partiality, or are so disproportionate as to shock the conscience, or the sustaining of the award would result in a manifest denial of justice."

Leimgruber v. Claridge Assocs., Ltd., 73 N.J. 450, 375 A.2d 652, 657 (1977) (citations omitted).

NEW MEXICO

" '[T]he findings of the jury should not be disturbed as excessive, except in extreme cases, as where it results from passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive where palpable error is committed by the jury, or where the jury has mistaken the measure of damages. However, the mere fact that a jury's award is possibly larger than the court would have given is not sufficient to disturb a verdict.' "

Richardson v. Rutherford, 787 P.2d 414, 422 (N.M. 1990) (quoting *Montgomery v. Vigil*, 65 N.M. 107,

113, 332 P.2d 1023, 1027 (1958) (quoting *Hall v. Stiles*, 57 N.M. 281, 285, 258 P.2d 386, 389 (1953))).

NEW YORK

"[T]he amount of exemplary damages awarded by a jury should not be reduced by a court unless it is so grossly excessive 'as to show by its very exorbitancy that it was actuated by passion'."

Nardelli v. Stamberg, 44 N.Y.2d 500, 377 N.E.2d 975, 977, 406 N.Y.S.2d 443, 445 (1978).

NORTH CAROLINA

"The award of punitive damages is within the discretion of the jury, subject to the limitation that the amount may not be excessively disproportionate to the circumstances."

Raymond U. v. Duke Univ., 91 N.C. App. 171, 371 S.E.2d 701, 709, *rev. denied*, 323 N.C. 629, 374 S.E.2d 590 (1988).

NORTH DAKOTA

"We will not overturn an exemplary damages award as excessive absent passion or prejudice on the part of the jury. Passion means that the jury was motivated by feelings or emotions rather than by the evidence. Prejudice includes forming an opinion without due knowledge or examination."

Olmstead v. First Interstate Bank of Fargo, N.A., 449 N.W.2d 804, 809 (N.D. 1989) (citations omitted).

OHIO

"[G]enerally, the amount of punitive damages to be awarded rests largely within the determination of the trier of fact. Furthermore, the trial judge is in

the best position to determine whether an award is so excessive as to be deemed the product of passion or prejudice, or to require remittitur. . . . [A]n '[a]ppellate court hesitates to enter *remittitur* or set aside [a] jury's verdict, supported by creditable proof, as excessive, in [the] absence of passion or prejudice evidenced by [the] record.'"

Villella v. Waiken Motors, Inc., 45 Ohio St. 3d 36, 543 N.E.2d 464, 469 (1989) (emphasis in original; citations omitted).

OKLAHOMA

"A punitive damages verdict lies peculiarly within the province of the jury and it will not be casually interfered with on appeal when it is claimed to have been actuated by passion or prejudice. Unless the verdict appears to be grossly excessive or the result of the jury's passion, prejudice or improper sympathy, it will not be conditioned by a remittitur. But where an award is found so out of proportion as to be unconscionable, a conditional affirmance, subject to remittitur, may be required."

Chandler v. Denton, 741 P.2d 855, 868 (Okla. 1987) (footnotes omitted).

OREGON

"Remittitur, in consequence of Oregon Constitution Art. VII, § 3, is not available in this state."

State ex rel. Young v. Crookham, 290 Or. 61, 618 P.2d 1268, 1272 (1980) (citing *Van Lom v. Schneiderman*, 187 Or. 89, 110-13, 210 P.2d 461, 471 (1949)).

PENNSYLVANIA

"[A]t some point the amount of punitive damages may be so disproportionate when compared to the character of the act, the nature and extent of the harm and the wealth of the defendant, that it will shock the court's sense of justice. In those rare instances, the court is given discretion to remit the damages to a more reasonable amount."

Kirkbride v. Lisbon Contractors, Inc., 521 Pa. 97, 555, A.2d 800, 803-04 (1989).

RHODE ISLAND

"A jury award of punitive damages may be set aside by the trial court if the amount 'clearly appears to be excessive, or to represent biased judgment.'"

Zarrella v. Robinson, 460 A.2d 415, 418-19 (R.I. 1983).

SOUTH CAROLINA

"It is not necessary in reducing an excessive verdict by granting a new trial nisi that the judge find it to be so excessive as to indicate it was the result of prejudice, caprice, passion, or other consideration not founded on the evidence; it is enough if the judge deems the verdict to indicate undue liberality on the part of the jury."

Johnston v. Brown, 290 S.C. 141, 348 S.E.2d 391, 394 (S.C. App. 1986), *rev'd on other grounds*, 292 S.C. 478, 357 S.E.2d 450 (1987).

SOUTH DAKOTA

"There is no precise mathematical ratio between compensatory and punitive damages. Punitive damages must not be so oppressive or so large as to shock the sense of fair-minded men, but they may considerably

exceed compensatory damages. To accomplish the objective of punishing the wrongdoer and deterring others from similar wrongdoing, punitive damages must be relatively large. The amount allowed in compensatory damages is but one of the circumstances to consider regarding the proper amount of punitive damages. Other factors that properly have a bearing upon the amount of punitive damages are the nature and enormity of the wrong, the intent of the wrongdoer, his financial condition, and all of the circumstances attendant to his actions."

Hulstein v. Meilman Food Indus., Inc., 293 N.W.2d 889, 892 (S.D. 1980) (citations omitted).

TENNESSEE

"Admittedly, it is difficult to lay down a rule for testing the excessiveness of a verdict for punitive damages; however, such an award will be set aside if it is grossly excessive or appears to be the result of passion, prejudice, improper sympathy, or for some other reason appears to constitute an injustice. The factors to be considered in assessing the award include the nature of the defendant's acts, the amount of compensatory damages awarded and the wealth of the particular defendant."

Coppinger Color Lab, Inc. v. Nixon, 698 S.W.2d 72, 75 (Tenn. 1985) (citations omitted).

TEXAS

"Although the verdict is large and the trial court, in the exercise of its sound discretion, could have set it aside, an appellate court will not disturb the verdict in the absence of circumstances tending to show that it was the result of passion, prejudice, or other improper motive; or that the amount fixed was not the result of a deliberate and conscientious conviction in the minds of the jury and the court; or that the

amount was so excessive as to shock a sense of justice of the appellate court."

Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 864 (Tex. App. 1987).

UTAH

"Generally, the only limitation on this discretion [of the jury to award punitive damages] is that the award must not be the result of passion and prejudice. The measure of the verdict might be so grossly excessive and disproportionate to the injury that this court would say, from that fact alone, that as a matter of law the verdict must have been arrived at by passion or prejudice. However, to support that conclusion, the verdict must be so excessive as to be shocking to one's conscience and to clearly indicate passion, prejudice or corruption on the part of the jury."

Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314, 328-29, (Utah 1979) (footnote omitted), *rev'd on other grounds, McFarland v. Skaggs Cos., Inc.*, 678 P.2d 298 (Utah 1984).

VERMONT

"Essentially, remittitur is evaluated by whether or not the damages were 'manifestly and grossly excessive.' Unless grossly excessive, this Court will not interfere with an award of damages where exact computation is impossible."

Lent v. Huntoon, 143 Vt. 539, 470 A.2d 1162, 1172 (1983) (citations omitted).

VIRGINIA

"[N]o fixed standard exists for the calculation of punitive damages and . . . it is an issue largely within the discretion of the jury. Nevertheless, the

'amount of punitive damages awarded should bear some reasonable relationship to the actual damages sustained and to the measure of punishment required. . . .'"

Philip Morris Inc. v. Emerson, 235 Va. 380, 368 S.E.2d 268, 286-87 (1988) (citation omitted) (quoting *Gazette, Inc. v. Harris*, 229 Va. 1, 51, 325 S.E.2d 713, 747, *cert. denied*, 472 U.S. 1032 (1985), and 473 U.S. 905 (1985)).

WASHINGTON

Punitive damages are not allowed. *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 P. 1072 (1891).

WEST VIRGINIA

"Only where the award of punitive damages has no foundation in the evidence so as to evince passion, prejudice or corruption in the jury should the award be set aside as excessive."

Wells v. Smith, 297 S.E.2d 872, 880 (W. Va. 1982).

In *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791, 800 (W. Va. 1986), the West Virginia Supreme Court of Appeals abandoned the rule that remittitur of indeterminate damages is impermissible, and established the following standard for deciding the amount of damages to be remitted:

"What is the highest jury award under the facts of this case that would not be monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such as manifestly shows jury passion, partiality, prejudice, or corruption?"

WISCONSIN

"We hold that the Powers Rule extends to punitive damages and a trial court has the power to reduce

the amount of punitive damages to which it determines is a fair and reasonable amount for such kind of damages."

Malco, Inc. v. Midwest Aluminum Sales, Inc., 14 Wis. 2d 57, 109 N.W.2d 516, 521 (1961) (citing *Powers v. Allstate Ins. Co.*, 10 Wis. 2d 78, 102 N.W.2d 393 (1960)).

WYOMING

"Consistently with the purposes of punishment and deterrence this court has identified the factors justifying an award of punitive damages as: '(a) the financial condition or wealth of the defendant; (b) the activity of the defendant causing the harm; and (c) the nature and extent of the injury suffered.'"

Adel v. Parkhurst, 681 P.2d 886, 891 (Wyo. 1984) (quoting *Cates v. Eddy*, 669 P.2d 912, 921 (Wyo. 1983)).

AMICUS CURIAE

BRIEF

(28)

No. 89-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA M. CALHOUN, and EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE WASHINGTON LEGAL FOUNDATION; U.S. REPRESENTATIVES JOE BARTON, DAN BURTON, HAMILTON FISH, JR., PAUL B. HENRY, HENRY J. HYDE, AND THOMAS E. PETRI; AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici will address the following issue:

Whether Alabama law, as applied below, violates Pacific Mutual's right to Due Process under the Fourteenth Amendment by allowing the jury to award punitive damages against Pacific Mutual in the absence of any advance notice to Pacific Mutual as to the potential size of a punitive damage award.

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INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 125,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of time to advancing the interests of the free enterprise system, and the economic and civil

liberties of individuals and businesses. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases affecting business. *See, e.g., Kansas and Missouri v. Utilicorp United Inc.*, No. 88-2109 (decision pending 1990); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893 (1989); *Tull v. United States*, 481 U.S. 412 (1987); and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

Reps. Joe Barton (Tex.), Dan Burton (Ind.), Hamilton Fish, Jr. (N.Y.), Paul B. Henry (Mich.), Henry J. Hyde (Ill.), and Thomas E. Petri (Wisc.) are Members of the United States House of Representatives. Each is vitally concerned that the nation's court systems fully respect the constitutional rights of all litigants. Their constituents, as consumers, must ultimately bear the large costs associated with the award of punitive damages in tort suits. Congress has been considering the adoption of reforms in the tort system, and the outcome of this lawsuit may well have an impact on the course of such reforms.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus* before this Court on several occasions in cases involving individual rights.

Each of the *amici* is affected by the increasing number of truly staggering punitive damage awards that have been imposed against civil litigants in recent years. The most frequent target of such awards are businesses. While the direct payors of such awards are the individual litigants themselves, the consuming public ultimately

pays for such awards in the form of higher prices and the absence of products forced off the U.S. market for fear of unpredictable liability.

Amici believe that the best interests of the consuming public will be served if the Court imposes some constitutional limitations on the award of punitive damages by state and federal courts. *Amici* are filing this brief because of their interest in promoting the welfare of the consuming public; they have no direct economic interest in the outcome of this lawsuit or of other lawsuits raising similar constitutional issues. Because of their lack of direct economic interests, *amici* believe that they can assist the Court by providing a perspective that is distinct from that of either party.

Amici submit this brief on behalf of Petitioner with the written consent of both parties.

STATEMENT OF THE CASE

Amici are, in the interest of brevity, omitting any detailed statement of the facts of this case. *Amici* adopt by reference the statement of facts contained in Petitioner's brief.

In brief, the Alabama courts in this case granted Respondents a $1,078,000 punitive damage award against Petitioner Pacific Mutual Life Insurance Co. ("Pacific Mutual") based on the conduct of one of Pacific Mutual's agents. The agent, unbeknownst to senior officials at Pacific Mutual, had collected health insurance premiums from Respondents *on behalf of another, wholly unrelated, insurance company* (Union Fidelity Life Insurance Co.) and then, instead of obtaining insurance coverage for Respondents through Union Fidelity, had simply pocketed the premiums.

Respondents discovered the agent's fraud after one of the Respondents, Cleopatra Haslip, was hospitalized and incurred $3,800 in medical expenses. Union Fidelity denied coverage for those expenses on the ground that no health insurance policy was in force. Those expenses, together with the trauma suffered by Ms. Haslip as a result of being faced with large, uninsured medical bills, were the only actual damages suffered by any of the Respondents in this case; all health insurance premiums paid by Respondents were refunded in full.

At trial, the jury was instructed that if it found the agent guilty of fraud and if it found Pacific Mutual responsible for the agent's conduct, it was free to award punitive damages against Pacific Mutual "in your discretion." The only guidance given to the jury as to the amount of punitive damages to be awarded was, "[Y]ou must take into consideration the character and degree of the wrong as shown by the evidence and the necessity of preventing similar wrongs." The jury then returned a punitive damage award against Pacific Mutual that was more than 283 times greater than Ms. Haslip's medical expenses. The jury award was twice as large as any punitive damages award that had ever been upheld in the history of the Alabama court system as of 1981, when the events relevant to this case took place.

The trial court and the Alabama Supreme Court (with two justices dissenting) upheld the jury's punitive damage award. *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So.2d 537 (Ala. 1989).

SUMMARY OF ARGUMENT

Alabama punitive damages law is overly vague; people of ordinary intelligence simply are unable to determine their potential liability for punitive damage awards and to fashion their conduct accordingly. The imposition of punitive damages on Pacific Mutual on the basis of Alabama's overly vague laws is a violation of Pacific Mutual's rights under the Due Process Clause.

The doctrine prohibiting the deprivation of liberty or property on the basis of overly vague laws -- known as the "void-for-vagueness" doctrine -- had its genesis in criminal cases. However, recent case law makes clear that the doctrine is equally applicable to civil cases, such as this case. Moreover, the doctrine is applicable not only to claims that the prohibited *conduct* is not clearly defined but also to claims, as here, that the potential *penalty* is overly vague. The argument that the doctrine can be invoked to void laws with overly vague penalty provisions is supported by analogy to the Ex Post Facto Clauses of the U.S. Constitution.

Finally, the void-for-vagueness doctrine is fully applicable even when it is not the government that seeks a judgment against the defendant but rather, as here, it is a private individual that seeks a judgment.

ARGUMENT

I. THE PUNITIVE DAMAGE AWARD IN THIS CASE VIOLATED PACIFIC MUTUAL'S DUE PROCESS RIGHTS IN THE ABSENCE OF ANY ADVANCE NOTICE TO PACIFIC MUTUAL AS TO THE POTENTIAL SIZE OF A PUNITIVE DAMAGE AWARD

Before the courts of Alabama may issue a judgment depriving Pacific Mutual of property, they must afford Pacific Mutual all protections it is entitled to under the Due Process Clause of the Fourteenth Amendment.[1] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). Chief among those protections is the right not to be deprived of property on the basis of any overly vague law. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). As the Court explained in *Grayned*:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* basis, with the attendant dangers of arbitrary and discriminatory application.

[1] The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any state deprive any person of life, liberty or property without due process of law.

A corporation is considered a "person" within the meaning of the Fourteenth Amendment. *First National Bank of Boston v. Bellotti*, *435 U.S. 765, 780 n.15 (1978).*

> vented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09. *See also* Note, "RICO's 'Pattern' Requirement: Void for Vagueness?," 90 Colum. L. Rev. 489, 512-14 (1990).

Amici believe that Alabama's system for the imposition of punitive damages in civil cases offends both of the important values cited above. By permitting juries to deprive defendants of their property through the imposition of punitive damages without simultaneously providing juries with adequate standards with which to determine whether to award punitive damages and, if so, in what amount, Alabama runs afoul of the void-for-vagueness doctrine, as enunciated by *Grayned*.

Amici understand that other briefs to be filed in support of Pacific Mutual will press the argument that Alabama punitive damages law offends the second of the two values cited in *Grayned*: that the law creates unacceptable dangers of arbitrary and discriminatory enforcement by impermissibly delegating basic policy matters to juries. Accordingly, *amici* have focused their brief on the argument that Alabama punitive damages law offends the first of the two values cited in *Grayned*: that the law deprived Pacific Mutual of fair notice that it might be held liable for the punitive

damages imposed upon it in this case.[2]

This Court has repeatedly recognized that an award of punitive damages is an "extraordinary sanction." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979). Punitive damages do not represent compensation for any injury suffered by the plaintiff in a civil suit; rather, they "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

The average person is aware that tort law requires him to pay all *actual* damages caused by his wrongful conduct. Given the reasonable foreseeability of most injuries suffered by others as a result of one's wrongful conduct, due process is not offended by a judgment requiring a defendant to compensate a plaintiff for all such injuries. Such a defendant has fair notice, before committing his wrongful act, of the potential magnitude of his liability. However, because punitive damage awards need not bear any relation to the amount of damages actually suffered, a defendant has no similar advance notice regarding the potential size of his punitive damages liability. As Justice O'Connor has explained, "Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. Hence, 'the impact of these windfall recoveries is unpredictable and potentially

[2] *Amici* believe that Alabama law failed even to place Pacific Mutual on notice that it was liable for *any* award of punitive damages. However, *amici* have focused this brief on a more narrow point: that even if Alabama law placed Pacific Mutual on notice that it might be held liable for some amount of punitive damages (based on a theory of vicarious liability for the unauthorized conduct of its agent), Pacific Mutual lacked any notice regarding the potentially vast size of a punitive damage award.

substantial.'" *Bankers Life and Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 1655 (1988)(O'Connor, J., concurring in judgment)(*quoting Electrical Workers v. Foust*, 442 U.S. at 50).

A state is free to cure that absence of notice by, for example, adopting laws that specify a range of potential punitive damage awards for specific types of wrongful conduct. However, Alabama has taken no such steps. Rather, it has delegated to juries unbridled discretion to determine the size of punitive damage awards as they see fit.[3] In the absence of any advance notice to Pacific Mutual that it could be held liable for more than $1 million in punitive damages based on its conduct in this case, the judgment entered by the Alabama courts is in violation of Pacific Mutual's due process rights and must be vacated.

It will not do for Respondents to argue that since Pacific Mutual was aware that Alabama juries are empowered to award punitive damages as they see fit, Pacific Mutual had notice of the possibility of a million-dollar verdict. Notice that one's conduct might subject one to punitive damages liability of anywhere from $1 to $10 million is no notice at all; the "person of ordinary intelligence" referred to in *Grayned* will be unable to use that notice as a guide to the conduct of his affairs. Nor is Alabama law saved because it is

[3] While Alabama jury verdicts awarding punitive damages are subject to post-trial review by the trial court and appellate courts, that review generally accords great deference to the jury's award and thus does little to control a jury's unbridled discretion to award punitive damages. *See, e.g., Campbell v. Burns*, 512 So.2d 1341, 1343 (Ala. 1987). Accordingly, Alabama appellate decisions provide virtually no notice as to the potential size of punitive damage awards.

judge-made rather than statutorily based. As Judge Jones of the Fifth Circuit has noted:

> [I]f a statute declared as an offense the refusal to pay an insurance claim without an arguable or reasonable basis, which refusal was attended by gross negligence or recklessness, and if the statute then punished this offense with fines ranging from zero to millions of dollars at the sole discretion of the factfinder, I think we would not hesitate to strike it down for vagueness.

Eichenseer v. Reserve Life Ins. Co., 894 F.2d 1414, 1421-22 (5th Cir. 1990)(Jones, J., dissenting from denial of rehearing en banc).

Moreover, even if it could be argued that companies doing business in Alabama today have notice of their potential liability for multi-million-dollar punitive damage awards, Pacific Mutual clearly had no such notice in the summer of 1981 -- when the events at issue in this lawsuit transpired. The largest punitive damages award ever affirmed by the Alabama Supreme Court up until that date was in the amount of $560,000. *See Shiloh Construction Co. v. Mercury Construction Corp.*, 392 So.2d 809 (Ala. 1980).[4] Accordingly, Pacific Mutual could not have had notice in 1981 that its conduct was opening itself up for a punitive damage award nearly twice as large as any award ever affirmed to that date.

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[4] A table listing all Alabama Supreme Court cases involving an award of punitive damages (and indicating the court's disposition of each case) is attached as Appendix E to Pacific Mutual's reply brief in support of its petition for a writ of certiorari.

In the absence of some advance warning to Pacific Mutual -- either in the form of a statute or in the form of a judicially crafted rule -- that its conduct toward Respondents would subject it to a punitive damage award in the range of the award actually rendered, the judgment in this case cannot pass muster under the Due Process Clause.

II. THE VOID-FOR-VAGUENESS DOCTRINE IS FULLY APPLICABLE TO CIVIL CASES

Many of the cases in which this Court has considered the void-for-vagueness doctrine have involved the application of criminal statutes, and language in some of those cases suggests that the doctrine applies with special force in the criminal context. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *Smith v. Goguen*, 415 U.S. 566, 573 n.10 (1974).

Nonetheless, one need not argue that a punitive damage award is a quasi-criminal penalty in order to invoke the protection of the void-for-vagueness doctrine against such awards. The Court has made clear that while greater deference will be granted to civil laws than to criminal laws when applying the void-for-vagueness doctrine, the doctrine is fully applicable in the civil context. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); Note, "Can Punitive Damages Standards Be Void for Vagueness?," 63 St. John's L. Rev. 52, 59 (1988). Thus, in *Giaccio v. State of Pennsylvania*, 382 U.S. 399 (1966), the Court struck down on vagueness grounds a Pennsylvania statute that authorized a jury, at its discretion and unguided by any clear standards, to impose the costs of a criminal prosecution on an acquitted defendant. The Court stated that whether the

statute should be classified as civil or criminal was irrelevant to the vagueness analysis:

> Whatever label has been given to the [Pennsylvania statute], there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his liberty and his property. . . . Implicit in this constitutional safeguard [the Due Process Clause] is the premise that the law must be one that carries an understandable meaning with legal standards that courts must accept.

Id. at 402, 403. Similarly, in *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951), the Court applied a void-for-vagueness test to a civil statute involving deportation proceedings.

In *Hoffman Estates*, the Court discussed several factors that should be considered in determining how strictly the void-for-vagueness doctrine should be applied to a given statute. Among those factors were:

> (1) Economic regulation is subject to a less strict vagueness test, particularly where the subject matter of the regulation is narrow, or where the regulated businesses have the opportunity to seek clarification of potentially vague regulations;
>
> (2) Laws with civil rather than criminal penalties are subject to a less strict vagueness test because the consequences of imprecision are less severe;
>
> (3) Laws containing a scienter requirement are subject to a less strict vagueness test, especially with respect to the adequacy of notice that one's conduct is proscribed; and
>
> (4) Laws that threaten to inhibit the exercise of constitutionally protected rights are subject to a more stringent vagueness test.

Hoffman Estates, 455 U.S. at 498-99.

Applying the factors enunciated in *Hoffman Estates* to this case, one could conclude that Alabama's punitive damages laws should be tested under a mode ely relaxed void-for-vagueness standard. First, those laws do not appear to be the type of "economic regulation" that the Court had in mind in *Hoffman* as meriting relaxed review; although Alabama's punitive damages laws are being applied to a business enterprise in this instance, the laws are of general applicability to all citizens and are not confined to a "narrow" subject matter. Moreover, Alabama has no mechanism whereby companies such as Pacific Mutual can seek guidance from the state government regarding their potential liability for punitive damages. *Cf. Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 668 (1985) (Brennan, J., concurring in part and dissenting in part) (there is little rationale for permitting punishment for violation of imprecise commercial regulations unless "a businessperson can clarify the meaning of an arguably vague regulation by consulting with the government administrators").

The second *Hoffman* factor -- whether the law challenged on vagueness grounds is civil or criminal -- would suggest that a somewhat relaxed vagueness test ought to be applied to the not-strictly-criminal state laws at issue in this case. However, the quasi-criminal nature of a large punitive damage award should not be

overlooked. As Justice O'Connor has noted, "The Court's cases abound with the recognition of the penal nature of punitive damages. *See Tull v. United States*, 481 U.S. 412, 422, and n.7 (1987)." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2932 (1989)(O'Connor, J., dissenting). The criminal/civil distinction becomes especially blurred when, as here, the entity being sanctioned is a corporation. A corporation cannot be incarcerated; thus, the sole criminal sanction that Alabama can impose on a foreign corporation is a monetary fine -- precisely the sanction imposed on Pacific Mutual here, but in an amount greater than the fine provided for under *any* Alabama criminal statute. Moreover, the stigmatizing effect to a corporation of a large punitive damages award may well prove to be as great as the stigmatizing effect of a criminal conviction. *See* Wheeler, "The Constitutional Case for Reforming Punitive Damages Procedures," 69 U. Va. L. Rev. 269, 280-83 (1983).

The third *Hoffman* factor -- whether the challenged law includes a scienter requirement -- militates in favor of application of a stricter vagueness test in this case. Alabama imposed punitive damages on Pacific Mutual without requiring a showing of scienter; rather, Pacific Mutual was held vicariously liable for the conduct of a non-managerial agent.[5]

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[5] The fourth *Hoffman* factor -- threats to constitutionally protected rights -- does not appear to be a major factor in this case. The decision in this case is unlikely to inhibit the exercise of such rights by Pacific Mutual. Nonetheless, the broad discretion granted to Alabama juries to impose punitive damages could cause others to refrain from exercising such rights. For example, newspapers have much to fear from libel suits brought under Alabama's liberal punitive damages provisions, notwithstanding the broad protection afforded newspapers by *Gertz*.

Regardless of the level of strictness with which the Court applies the void-for-vagueness test in this case, the scheme under which Alabama permits the imposition of punitive damages cannot meet that test. Alabama is required under the Due Process Clause to provide *some* guidance to potential defendants regarding the size of punitive damage liability that may arise from a given course of conduct. Application of a less strict vagueness test in this case would permit Alabama to provide that guidance with less clarity (*e.g.*, to specify that punitive damage awards would fall somewhere within a relatively broad range). However, there is no constitutional sanction for what Alabama has done in this case: impose a huge punitive damage award against Pacific Mutual without any advance notice.

III. PROVIDING NOTICE OF POTENTIAL PENALTIES IS JUST AS IMPORTANT AS PROVIDING NOTICE OF PROHIBITED CONDUCT

In addressing the requirement that defendants be given fair warning, the great majority of this Court's void-for-vagueness decisions have focused on the need to provide defendants with a reasonable opportunity to discern what conduct is prohibited. Nonetheless, the Court's case law is clear that the Due Process Clause also requires that advance notice be provided regarding potential penalties. Thus, in *United States v. Batchelder*, 442 U.S. 114, 122 (1979), the Court stated, "So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *See also Bankers Life and Casualty Co. v. Crenshaw*, 108 S.Ct. at 1656 (O'Connor, J., concurring in judgment) ("[t]his grant of wholly standardless discretion to

determine the severity of punishment appears inconsistent with due process").

Fair warning of the consequences of engaging in prohibited conducted is particularly important when, as here, the defendant is a corporation being held vicariously liable for the acts of others. It could be argued plausibly that an individual defendant has no cause for complaint concerning his punishment if he knowingly engages in prohibited conduct, even if he had no advance warning of the potential consequences of his conduct; one could argue that such an individual could have avoided those consequences by adhering to known rules of conduct.[6] That argument has no force, however, when the defendant is a corporation facing vicarious liability for the acts of others. Such a defendant cannot be said to have knowingly engaged in prohibited conduct. The worst that can be said about such a corporation is that it failed to take sufficient steps to prevent wrongdoing by others.[7] But the affirmative steps that a corporation will take to prevent wrongdoing by others will necessarily depend in large measure on the potential consequences to the corporation of others' wrongdoing. Had Pacific Mutual known that it would be subject to million-dollar-plus punitive damage verdicts for any wrongful acts of its agents, one can rest assured that Pacific Mutual would have done

[6] That argument, however, appears to ignore basic human nature. To quote Aristotle: "The generality of men are naturally apt to be swayed by fear rather than by reverence, and to refrain from evil rather because of the punishment that it brings than because of its own foulness." Aristotle, *Nichomachean Ethics* bk. X, ch. 9 at 1.

[7] For example, in this case, the Alabama Supreme Court faulted Pacific Mutual for not taking steps to rein in its agent upon first learning of complaints being filed against him. *See* Petition for Writ of Certiorari at A14-15.

all it could to prevent such acts.[8] Accordingly, there is a fundamental unfairness in permitting Alabama to sandbag Pacific Mutual by failing to disclose in advance the dire consequences that could befall Pacific Mutual for the misconduct of others.

This Court's consistent interpretation of the Ex Post Facto Clauses of the Constitution[9] strongly supports the argument that the vagueness doctrine requires fair warning of penalties as well as prohibited acts. The Court's first discussion of the *ex post facto* prohibition in 1798 made clear that the prohibition extended to after-the-fact changes in criminal penalties. The Court discerned four types of laws prohibited by the clauses:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. *Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.* 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony than the law required at the time of the commission of the offense, in order to convict the offender.

[8] For example, at a cost far less than the judgment entered in this case, Pacific Mutual could have hired an additional team of internal investigators whose full-time job it would have been to root out fraudulent activity by agents. But such measures would make economic sense only *after* a corporation has been given fair warning that it will be subject to million-dollar-plus punitive damage awards if such activity persists.

[9] U.S. Const. art. I, § 9, cl. 3; art. I, § 10, cl. 1.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798)(emphasis added). The Court repeatedly reaffirmed that broad reading of the *ex post facto* prohibition in the succeeding 200 years. *See, e.g., Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867); *Rooney v. North Dakota*, 196 U.S. 319 (1905); *Dobbbert v. Florida*, 432 U.S. 282 (1977); *Weaver v. Graham*, 450 U.S. 24 (1981).

The rationale underlying the Court's broad reading of the *ex post facto* prohibition is identical to one of the rationales underlying the void-for-vagueness doctrine: that citizens be given fair warning both of prohibited conduct and of the consequences of engaging in such conduct. *Id.* at 29-30 ("[t]hrough [the *ex post facto*] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed"). The Ex Post Facto Clauses have direct application only to explicitly criminal statutes and thus appear not to be applicable in this case. Nonetheless, given the similarity between the rationale underlying those clauses and the rationale underlying the void-for-vagueness doctrine, the Court's consistent interpretation of those clauses as applying to punishment as well as to conduct lends strong support to a similar interpretation of the void-for-vagueness doctrine.

IV. PUNITIVE DAMAGE AWARDS IMPLICATE DUE PROCESS CONCERNS REGARDLESS WHETHER, AS HERE, THE PARTY RECEIVING THE AWARD IS A PRIVATE PARTY

Several of the cases in which this Court has applied the void-for-vagueness test in non-criminal matters were cases in which the plaintiff was a governmental entity.

See, e.g., Hoffman Estates, 455 U.S. 489 (1982); *Giaccio*, 382 U.S. 399 (1966); *Jordan v. DeGeorge*, 341 U.S. 223 (1951). However, in none of those cases did the Court indicate that the governmental status of the plaintiff had any bearing on the applicability of due process concerns to the statute at issue. To the contrary, this Court's case law makes clear that due process concerns are implicated whenever a state's judicial powers are invoked, regardless of the plaintiff's identity. *Logan v. Zimmerman Brush Co.*, 455 U.S. at 429. Thus, in *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349-50, the Court held that a libel suit brought by a private party involved sufficient state action that the defendant was entitled to invoke First Amendment protections against efforts by the plaintiff to recover punitive damages.

The Court has repeatedly held that state action is present -- and thus that due process concerns are implicated -- whenever the state courts use their enforcement powers to transfer property from one person to another. *North Georgia Finishing, Inc. v. DiChem*, 419 U.S. 601 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadich v. Family Financial Corp.*, 395 U.S. 337 (1969). *See* Wheeler, *supra*, 69 U. Va. L. Rev. at 277.

It is true that the State of Alabama is not a party to this action. Nonetheless, the Alabama courts have, at Respondents' instigation, directed Pacific Mutual to pay damages of more than $1 million to Respondents. Accordingly, the actions of the Alabama courts are subject to review in this case under the Due Process Clause. As *amici* have demonstrated above, the Alabama courts' imposition of punitive sanctions against Pacific Mutual violated Pacific Mutual's due process rights because of the absence of any warning to Pacific Mutual -- prior to

the events giving rise to this case -- regarding the potential size of punitive damage awards.

CONCLUSION

Amici respectfully request that the decision of the Alabama Supreme Court be reversed. The case should be remanded to the Alabama Supreme Court with directions to schedule a new trial on the issue of damages (from which all punitive damage issues should be excluded).

Respectfully submitted,

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